No. 98-1189

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO THE BRIEF IN OPPOSITION

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This brief responds to respondents' brief in opposition.

I. SINCE THE FILING OF THE PETITION, THE NINTH CIRCUIT HAS DECIDED A CASE CONCERNING THE FIRST AMENDMENT'S LIMITS ON A PUBLIC UNIVERSITY'S FUNDING OF STUDENT SPEECH WHICH EXPRESSLY REJECTS THE SEVENTH CIRCUIT'S REASONING IN THIS CASE.

On February 23, 1999, the Ninth Circuit issued a decision in *Rounds v. Oregon State Board of Higher*

Education, No. 97-35189, 1999 WL 86684 (9th Cir. Feb. 23, 1999), upholding the imposition of mandatory incidental student fees contributed to the support of the Oregon Student Public Interest Research Group Education Fund (OSPIRG EF).[1] Based on factual differences concerning the use of the challenged fees, the Ninth Circuit did not view its decision as conflicting with the Seventh Circuit's decision in the present case, to the extent the latter concerned the collection and distribution of student fees earmarked for the Wisconsin Public Interest Research Group (WISPIRG).[2] *Id.* at *8. However, the Ninth Circuit rejected the Seventh Circuit's broader approach to funding of all student groups, expressly stating that "[t]o the extent *Southworth [v. Grebe*, 151 F.3d 717 (7th Cir. 1998)] holds that a public university may not constitutionally establish and fund a limited public forum for the expression of diverse viewpoints, we respectfully disagree . . . ." *Id.* at *9 n.5. Indeed, the Ninth Circuit relied on a forum analysis similar to that rejected by the court of appeals in this case in concluding that the OSPIRG EF funding was constitutional. *See, e.g., id.* at *7 ("[t]hrough this process, the University has created a limited

[1] Respondents' brief in opposition notes the Eighth Circuit's decision, issued February 1, 1999, in *Curry v. Regents of the University of Minnesota*, No. 98-3284, 1999 WL 42242 (8th Cir. Feb. 1, 1999). Br. in Opp'n at 13. The decision is interlocutory, addressing the claimed right of student organizations to intervene in a lawsuit similar to the instant one, challenging the University of Minnesota's funding of campus organizations that engage in ideological or political advocacy with which the plaintiffs disagree. *Curry*, 1999 WL 42242, at *1. The decision does not consider whether the First Amendment would *permit* a public university to provide such funding on a viewpoint neutral, or any other, basis. However, ruling that the proposed intervenors lack standing, the Eighth Circuit states that student groups have no legal or constitutional right to *compel* unwilling students to provide financial support for their activities. *Id.*

[2] WISPIRG's funding is unique among all of the student organizations receiving funding through the student fee at the University of Wisconsin, Madison, including the eighteen that respondents object to, in that it is approved by special referendum of the student body.

public forum, see *Rosenberger [v. Rector and Visitors of the Univ. of Va.]*, 515 U.S. [819,] 830 [(1995)], that encourages 'a diversity of views from private speakers,' *id.* at 834").

II. THE BRIEF IN OPPOSITION UNDERSCORES THE NEED FOR CLARIFICATION OF THIS IMPORTANT AREA OF FIRST AMENDMENT LAW.

1. While opposing certiorari, much of the brief in opposition supports review. Respondents directly argue that this Court should send "a clear message" to the lower courts that *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), are not in conflict. Br. in Opp'n at 18.

2. Even when arguing that the Seventh Circuit's decision follows this Court's instruction in *Rosenberger* to use *Abood* to decide student fee opt out cases, Br. in Opp'n at 11-16, respondents confirm the need for resolution of this important First Amendment issue. Both respondents and the Seventh Circuit read *Rosenberger* as determining the validity of the University of Wisconsin's fee system. *See* Br. in Opp'n at 13, quoting *Southworth v. Grebe*, 151 F.3d 717, 722 (7th Cir. 1998) (Pet.-Ap. 22a). This is plainly wrong. *Rosenberger* expressly left open the question of an objecting student's right to opt out of a fee used to fund other students' expressive activities:

> The [student] fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-236 (1977).

Rosenberger, 515 U.S. at 840. *See also id.* at 851 (O'Connor, J., concurring) (noting the possibility of a free speech challenge by an objecting student to paying for speech with which she disagrees).

3. While respondents and the Seventh Circuit are properly criticized for reading *Rosenberger*'s precedent too expansively, respondents offer an analytic alternative to the forum analysis presented in the petition and underlying Judge Wood's and Judge Rovner's dissents below (Pet.-Ap. 2a-12a). At several points in the Brief in Opposition, respondents argue that while *Rosenberger* requires the viewpoint neutral *distribution* of fees used to fund student expression, *Abood* requires the strictly voluntary *collection* of such fees. *See* Br. in Opp'n at 11-12, 15.

The Regents regard respondents' alternative standard as deficient both because it reduces *Rosenberger* to a requirement that student groups be voluntarily funded and because it lacks a principled basis. There is no obvious logic to requiring viewpoint neutrality in the distribution of funds which have been collected on a voluntary basis. The distribution of funds based on a donor's preferences would ordinarily not be regarded as viewpoint neutral, while the constitutional significance of the governmental action would be little more than that of a collection intermediary. Moreover, respondents' collection/distribution dichotomy ignores the fact that creating a forum open to all speakers, whether or not the forum is spatial, furthers, rather than transgresses, First Amendment values.

On this issue, respondents argue that under the Regents' forum analysis a public university could require Jewish students to fund a Christian evangelistic newspaper or compel African-American students to fund neo-Nazi or Ku Klux Klan organizations. Br. in Opp'n at 17-18. Respondents also draw a distinction between the creation of a spatial forum, which has public good attributes, and the

provision of non-spatial resources to facilitate student expression, such as the funding provided in *Rosenberger* and in this case, whose consumption is necessarily adverse to other groups. *See* Br. in Opp'n at 17.

We agree that these are considerations raised by the questions presented. Conceivably, a university retains some authority to impose viewpoint neutral restrictions on a student group's ability to obtain *Rosenberger* funding--such as provisions against certain types of discrimination in membership, *see, e.g.*, Pet.-Ap. 106a-107a, ¶14--which might mitigate the neo-Nazi example. But for the most part, respondents have correctly extended forum analysis to its logical conclusion. Yet it is also the case that general tax levies can be used to construct public auditoriums in which Christian evangelistic services may be held or to provide the law enforcement necessary to preserve public order at a Ku Klux Klan rally. With respect to the expressive activities of student groups receiving university funding on a viewpoint-neutral basis, the long-standing First Amendment response to objectionable speech--that of more, not less, speech--remains the most sound. This response seems particularly appropriate where the speech occurs at a nationally prominent, public university.

With respect to respondents' public good/private good distinction, the Regents do not believe these paradigms from economic theory are capable of providing the content of the First Amendment. Without a substantial retreat from *Rosenberger*, the public good character of the resources provided for private expression is not determinative. Limited resources may, in fact, run out before all speech has been funded, without a distribution mechanism losing its character as viewpoint neutral. The same could happen when two or more groups wanted to use a public auditorium at the same time and date.

Respondents' counter arguments are legitimate and need to be answered. This case provides a suitable opportunity to answer the question that *Rosenberger* reserved and to provide the needed framework for future cases.

III. NOTWITHSTANDING RESPONDENTS' EFFORTS TO DISTANCE THEMSELVES FROM THE FACTUAL STIPULATIONS HELPING TO FRAME THE QUESTIONS PRESENTED, THE CASE REMAINS APPROPRIATE FOR DEFINING THE FIRST AMENDMENT'S LIMITS ON A PUBLIC UNIVERSITY'S FUNDING OF STUDENT SPEECH AND SERVICES.

Respondents attempt to distance themselves from their stipulations in the district court that "[t]he process for reviewing and approving allocations for funding [of student groups] is administered in a viewpoint-neutral fashion," Pet.-Ap. 106a, ¶12, that the service, or GSSF, component of the challenged fee constitutes "a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students," Pet.-Ap. 106a, ¶ 13, and that "GSSF funds should also contribute significantly to student health, safety or academic success." *Id.* Without even commenting on their stipulation, respondents chose to describe the system for distributing funding for student expression as one that provides "no guarantee that a student organization will receive any money at all from the mandatory fee fund." Br. in Opp'n at 3. Respondents further assert that under the challenged system, "[t]he student government and the Board of Regents have total discretion to decide which organizations will have access to the forum of mandatory fee money," *id.*, *see also id.* at 16-17, although no

part of the record is cited for this.[3] As with several parts of the Seventh Circuit's decision, respondents do not treat any of their factual summary as disputed--in which case the questions presented would be appropriately framed by the procedure for summary judgment--but as established in the manner most favorable to respondents' view of the case.

The reason for this approach is that respondents would like this Court to decide whether a public university is constitutionally restricted to using voluntary collections to fund student expression, "even if the University distributes the funds in a viewpoint-neutral forum like the one in *Rosenberger*," Br. in Opp'n at i, but without foregoing a later challenge to the neutrality of the distribution process, should their constitutional interpretation be rejected. Respondents' dual purpose of asking this Court to provide guidance to the

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[3] Similarly, respondents refer to the University's claiming that "it could show that it operates a viewpoint-neutral forum of funding like that at issue in *Rosenberger* . . ." Br. in Opp'n at 12. On the issue of student groups receiving funding to provide campus services, respondents refer to a "select group" of seventeen campus organizations receiving between $6,906 and $481,673. *Id.* at 3. On the one hand, they acknowledge that "[s]ome of these services were legitimate services with no component of advocacy, such as the shuttle bus and the study center." *Id.*. In the next breath, they assert that "the only 'service' . . . provided were such things as organized lobbying efforts at the state capitol on the organization's legislative agenda, work on the causes promoted by the funded organization and the 'service' of disseminating the funded organization's viewpoints on campus." *Id., see also id.* at 15 n.1 ("The only 'benefit' or 'service' the students receive from the groups at issue in this case is the one of listening to them advocate their own ideological agendas").

The Regents acknowledge that the stipulations regarding the viewpoint neutrality of the distribution process and the provision of services to a substantial portion of the student body were simplifying assumptions, used to focus the issues in litigation. However, it was respondents' decision to so frame their case. Had they wanted to challenge the viewpoint neutrality of the fee distribution system--essentially, an application of *Rosenberger*—or the provision of actual student services, this would have been a much different lawsuit presenting significantly different legal issues.

lower courts on the issues presented by the petition, while simultaneously distancing themselves from the factual stipulations which help frame the questions presented, gives the Brief in Opposition a somewhat schizophrenic quality.

It does not, however, render the case less appropriate for decision of these important First Amendment issues. A number of procedural rules are sufficient to keep the case from straying factually from its central legal controversy. These range from the binding effect of a party's stipulation, to the methodology for deciding cases on summary judgment, to the obligation of a party opposing a petition for writ of certiorari to point out any perceived misstatement of fact or law in the petition, bearing on the issues that would be before the Court, were the petition to be granted. As in any case, to the extent factual issues need to be resolved before final judgment can be entered, the case can be remanded to the court of appeals for action consistent with this Court's ruling.

More importantly, the opposition of conceptual frameworks that was evident in the court of appeals' decision and in the dissents of Judges Wood and Rovner, continues to be squarely presented by this case. Petitioners regard the imposition of a student fee, distributed to student organizations on a viewpoint-neutral basis, as fundamentally similar to the opening of a park, auditorium, university mall or other public forum. Respondents regard such a fee system as not different from the collection of union dues that are contributed to a specific political campaign. The court of appeals understood *Rosenberger* to require viewpoint neutral funding. *Southworth*, 151 F.3d at 722 (Pet.-Ap. 22a) ("The Supreme Court held that the student activity fees created a fora of money and that once established the fora had to be made available on a viewpoint-neutral basis"). It was precisely this possibility which the court regarded as anathema to individual liberty. *See id.* at 730 n.11 (Pet.-Ap. 40a) ("under *Rosenberger* it would seem that if the university

opens up funding to private organizations it must fund not only the Socialists and the Greens, but the Republicans, the Democrats, the KKK, Nazis, and the skinheads; the Nation of Islam, the Christian Coalition, and Catholic, Protestant, Jewish, and Islamic organizations. . . . If the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities--that is the only way to protect the individual's rights").

By resolving this fundamental difference in the conception of publicly subsidized expression, this Court will provide to the lower courts--and to the nation's public universities--the analytical framework for consistent and principled decisions in this important area of the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

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